

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

PEOPLES AUTO PARKING COMPANY, INC.

and

Case 13–CA–42993

MEHMET GUNDOGDU, An Individual

*Sylvia L. Taylor, Esq.*, for the General Counsel.

*John D. Meyer, Esq.*, for the Respondent.

BENCH DECISION

Statement of the Case

**MICHAEL A. MARCIONESE, Administrative Law Judge.** I heard this case in Chicago, Illinois on April 24 and 25, 2006. Mehmet Gundogdu, an Individual, filed the charge on November 17, 2005<sup>1</sup> and amended it on February 1, 2006. The complaint issued on February 24, 2006 alleging that Peoples Auto Parking Company, Inc., the Respondent, violated Section 8(a)(1) of the Act on September 19 by interrogating employees about their union activities and violated Section 8(a)(1) and (3) on October 3 by discharging the Charging Party. On March 8, 2006 the Respondent filed its answer to the complaint denying that it committed the alleged unfair labor practices and raising, as an affirmative defense, that the charge should be deferred to a contractual grievance/arbitration provision. On April 18, 2006, the Respondent filed an amended answer in which it withdrew this affirmative defense and pleaded a new affirmative defense asserting that the Respondent would have discharged the Charging Party for failing to report for work or call in irrespective of any union or protected concerted activity.

After hearing the testimony of witnesses called by both sides, reviewing the documentary evidence, and considering the arguments of counsel, I rendered a decision from the bench pursuant to Section 102.35(a)(10) of the NLRB's Rules and Regulations. For the reasons stated by me on the record at the close of the hearing, I found that the General Counsel had not proved, by a preponderance of the evidence, that the Respondent interrogated employees or discharged the Charging Party in violation of the Act.

In finding that the Respondent's supervisor, Steve Cetinbag, did not unlawfully interrogate the Charging Party, I found that his questioning was not coercive under the circumstances, applying the test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub. nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985) and *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217 (1985). Specifically, I found that Cetinbag's conduct in asking Gundogdu why he had complained to the Union was a spontaneous response to the phone call he had received from the Union's Business Agent. Because this questioning

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<sup>1</sup> All dates are in 2005 unless otherwise indicated.

was unaccompanied by any threats or other statements that would render the questioning coercive, I recommended dismissal of the allegation. See *Heartshare Human Services of New York, Inc.*, 339 NLRB 842 (2003).

With respect to the alleged discharge, I found that the General Counsel had not established that Respondent was motivated by any union or protected concerted activity when it terminated Gundogdu after he failed to report for work or call in for three days. Although Gundogdu had a reasonable basis for believing he had been terminated when he arrived for work on October 3 and found his timecard missing, the evidence does not establish that Respondent intended to terminate Gundogdu when Cetinbag sent him home on September 29 because he had exceeded his scheduled hours. I credited Cetinbag's testimony that he sent Gundogdu home in response to Gundogdu's essentially insubordinate conduct of continuing to work six hours a day even after the Respondent had reduced his hours to four per day. The Act does not protect employees who engage in this type of self-help.

I hereby certify the accuracy of that portion of the transcript, pages 282 through 309, containing my bench decision. A copy of that portion of the transcript, as corrected, is attached hereto as "Appendix B".<sup>2</sup>

#### Conclusions of Law

1. The Respondent, Peoples Auto Parking Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent did not interrogate any employees in violation of Section 8(a)(1) of the Act.

3. The Respondent did not discharge Mehmet Gundogdu in violation of Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C., May 26, 2006.

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Michael A. Marcionese  
Administrative Law Judge

<sup>2</sup> The names of witnesses Thomas Baryl, Thomas Van Duerem, Recep Gunen and Zeberdee Barnes are misspelled throughout the transcript as "Burrell", "Van Buren", "Guman" and "Zeber D", respectively. I hereby correct these typographical errors. Other corrections to the transcript are attached to this decision as Appendix A.

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## APPENDIX A

## Corrections to the Transcript

5	<u>Page(s)</u>	<u>Line(s)</u>	<u>Delete</u>	<u>Insert</u>
	284	8	drives	derives
	284	13	226	2(2) (6)
10	284	13	25	2(5)
	286	17	Cetinbag	Gundogdu
	294	17	was	with
	297	21	Monday	Wednesday
	302	22	Right Line	<i>Wright Line</i>
15	303	14	Inter Borough	<i>Interboro</i>
	306	22	the Respondent	General Counsel
	308	15	misunderstand	misunderstanding

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**APPENDIX B**

ADMIN. LAW JUDGE MARCIONESE: Okay. All right, thank you very much. Let's see, I have about 11:30, 11:25, why don't we take a recess until. Well I'm going to give myself an hour to look over my notes and look over this new case, Engineered Comfort Systems. So we'll be in recess until, let's say 12:30 and then at that point we'll return and I'll render my Bench Decision.

MS. TAYLOR: Yes, your Honor.

(Whereupon a recess was taken from 11:25 a.m., to 12:32 a.m.)

ADMIN. LAW JUDGE MARCIONESE: We're back on the record. Okay, good afternoon everyone. I've now had a chance to look over the exhibits and the, consider the testimony, based on my notes and I've also considered your arguments and I'm prepared to issue my Bench Decision.

Okay, now under the Boards rules and regulations, Section 102.35A10, an Administrative Law Judge has the authority to render Bench Decisions and a Bench Decision still is, it's required to meet certain minimal requirements in terms of what needs to be included in terms of review of the testimony, of findings of fact and conclusions of law.

Now, what I will start off by reciting the history of the case. The initial Charge in this proceeding was filed by the Charging Party, Mehmet Gundogdu, who is an individual, on November 17, 2005 and amended on February 1, 2006.

Based on that Charge, as amended, the General Counsel has issued a Complaint and Notice of Hearing on February 24, 2006, alleging that the Respondent, Peoples Auto Parking Company, Inc. violated Section 8A1 on September 19, 2005 by interrogating employees regarding their Union activities and violated Section 8A1 and 3 by discharging the Charging Party on October 3, 2005 because of Union and protected concerted activities.

Now on March 8, 2006, the Respondent filed its answer to the Complaint which it

amended on April 18<sup>th</sup>, denying the alleged Unfair Labor Practices and asserting as an affirmative defense that even if the General Counsel had established Prima Fascia evidence of discrimination, Respondent would have terminated the Charging Party for failing to report for work or calling in, irrespective of Union activity.

Now, the hearing opened yesterday and we've heard testimony from a number of witnesses, documents have been received in evidence. I reviewed that material and considered the arguments made by Counsel in their closing arguments and I hereby make the following findings of fact. With respect to jurisdiction, the Respondent, an Illinois Corporation, with an office and place of business at 328 South Jefferson Street, Suite 212, Chicago, Illinois and with other facilities in Chicago including South Wabash and Clark Street is engaged in the operation and management of retail parking facilities.

The Respondent annually drives more than \$500,000 in Gross Revenues and purchases and receives more than 5000 in goods and services directly from points outside the State of Illinois. Respondent admits and I find that Respondent is an Employer engaged in commerce within the meaning of Section 226 and 7 of the Act and that Teamsters Local 727 is a labor organization within the meaning of Section 25 of the Act.

Now the evidence in the record shows that the Respondent, which has been in business since about the 1920's, operating parking facilities in and around Chicago, has had a contractual relationship with Teamster's Local 727 since about the 60's or 70's and at the time of the events and dispute here, Respondent employed about 18 or 19 employees as parking attendants, cashiers and other related classifications in the Bargaining Unit, at eight facilities.

And 11 of these employees were full-time employees. Mr. Tom Burrell is a Vice-President of the Company which apparently is owned by his family. Mr. Thomas Van Buren is a Vice-President in charge of Operations and has held that position for about two and a half years and Steve Cetinbag is the Field Manager for the Respondent, a position he has held for 11 years

and he is the individual directly responsible for scheduling employees and assigning them work and it's undisputed that he is the supervisor, Agent of the Respondent, within the meaning of the Act.

Now in support of the Unfair Labor Practice charges in the Complaint, the General Counsel relies primarily on the testimony of the Charging Party, Mr. Gundogdu. Now there is no dispute that Mr. Gundogdu was hired by the Respondent in 2001 and worked as a parking attendant at least until September 30, 2005. His last date of employment.

There is a dispute as to whether he was hired as a full-time or a part-time employee with the Charging Party testifying that when he was hired he was promised that he would become a full-time employee within six months. Mr. Cetinbag, who is the individual who hired the Charging Party, while not specifically denying that he made such a promise to the Charging Party, testified affirmatively that when he hired Mr. Gundogdu, he hired him as a part-time employee and that in fact he hired him on two occasions as a part-time employee.

The Charging Party also testified that at one point he was working full-time hours, but that at some subsequent point, which is not entirely clear when, his hours were reduced to six hours a day, which he continued to work primarily at the South Wabash Street facility until late September when he was reassigned to the Clark Street facility and his hours were reduced even further, to four hours a day.

The Charging Party testified that he repeatedly complained to his supervisor, Mr. Cetinbag, about his lack of full-time hours over the last three years and on cross examination, he "admitted" and I'll put admitted in quotation marks, that when he complained about his hours, Mr. Cetinbag told him that you have a Union, (go to your Union, I no give full-time hours.)

Now I put the admission there in parenthesis because as with most of Mr. Cetinbag's testimony, it was unclear to what extent he understood the questions that he was being asked or whether he was sufficiently able to articulate his responses because of General Counsel's

failure to have a translator available to assist in the presentation of the case. But at least, and it's not clear to me that his admission was based on a full understanding of what he was asked.

5 But in any event, there seems to have been some discussion, over the years, between the Charging Party and Mr. Cetinbag regarding his hours of work and that there was reference to 10 the Union, at least in some of those conversations. Mr. Gundogdu also testified that he repeatedly complained to his Union about not working full-time and without success.

15 Specifically, he testified that in April of 2005, Mr. Zeber D. Barnes, who had recently become the new Business Agent assigned to represent the employees of the Respondent, came to his workplace at South Wabash and asked if he had any problems, at which point the 20 Charging Party told Mr. Barnes that he had been working since 2001, and nobody gave him full-time hours.

25 According to the Charging Party, Mr. Barnes told him that he would go into the office and check the Company's records and get back to him, but Mr. Barnes never did that according to the Charging Party. So he called the Local Union, he called the Union's office, State Union I 30 assume, in Springfield, Illinois and testified that he also called the International Union's headquarters in Washington, in an effort to get the Union to assist him with his complaint about not being assigned full-time hours. 35

Cell phone records that were introduced into evidence by the General Counsel, do show a phone call being made to Washington, D.C., on August 26<sup>th</sup>, but there's no evidence in the 40 record to establish that the phone number on the cell phone is in fact the phone number of the International Union. The phone records do show phone calls to the Local Union's office 45 number, as confirmed by Mr. Barnes, on that same date of August 26<sup>th</sup> and again on September 1<sup>st</sup> of 2006, I mean 2005. And Mr. Gundogdu claims that he still did not get any assistance from the Union.

50 He also testified that in mid-September, his supervisor, Mr. Cetinbag, came to his work

location on South Wabash Street and asked him in Turkish, why you call Washington, why you  
call Union, why you complain? And that he responded, also in Turkish, by explaining his desire  
5 for full-time employment to provide for his family and this is the conversation that the General  
Counsel alleges in the complaint was an unlawful incidence of interrogation. Again, it  
10 would have been helpful if we had had a Turkish translator who, so that Mr. Gundogdu could  
have told us, in Turkish, exactly what was said by him to Mr. Cetinbag and by Mr. Cetinbag to  
him and then the translator would have been able to translate that for us so that we would have  
15 a clear understanding of what the conversation was about.

Not long after this conversation, the Charging Party was transferred to the Clark Street  
20 garage and the General Counsel has not alleged that the transfer was unlawfully motivated.  
The Charging Party testified that on the Friday after he went to the Clark Street garage, which  
was the last Friday in September, by everybody's agreement, Mr. Cetinbag came to his work  
25 area and again asked why he complained and told the Charging Party to go home.

Now it's unclear, because of the language difficulties, whether Mr. Cetinbag also told him  
30 he was fired or whether he just told him to go home. Then, on October 3<sup>rd</sup>, when the Charging  
Party reported to work at his usual time at Clark Street, his timecard was not with those of the  
other employees and Mr. Gundogdu asked whoever he saw there, the cashier, other  
35 employees, where his timecard was, and no one had his timecard.

And in order to prove he was there, the Charging Party retrieved a blank timecard from  
40 the cashier, wrote his name on it and punched the clock at 6:15 a.m., but he took the card with  
him and there's no evidence in the record that the Respondent ever saw the timecard that he  
45 punched at 6:15 that morning.

The Charging Party also testifies that after he waited around for a couple of hours for Mr.  
Cetinbag to arrive and that Mr. Cetinbag never came, so he went home. And during that time  
50 that he was waiting, according to the Charging Party, he also called the Union and told the

secretary who answered the phone, that the manager had taken his timecard and no one ever, from the Union, ever got back to him.

Now the only other witness called by the General Counsel, was Zeber D. Barnes, the Vice-President of Teamsters Local 727, and the Business Agent responsible for servicing this Bargaining Unit, since about May of 2005. Now, Mr. Barnes, did corroborate the Charging Party's testimony about visiting him at his work site soon after he became Business Agent, and he also corroborated that the Charging Party had complained to him then about his hours. And although Mr. Barnes testifies that he told the Charging Party he would do what he could for him, he admitted that he did nothing for the Charging Party until the Charging Party called him again in August. Now, in response to that call, Mr. Barnes, in fact wrote out a Grievance, which is in evidence, and is dated August the 12<sup>th</sup> of 2005, and it does describe the Grievance, Mr. Gundogdu's complaint is that the Respondent was not giving him full-time, and bypassing him and giving full-time to newer employees.

Now Mr. Barnes testified that he did call the Respondent in August, about the time that he wrote up the Grievance, in order to set up a meeting to discuss the Grievance, but was told by the secretary, or whoever answered the phone at the Company, that the person he had to meet with was away for a few weeks and although Mr. Barnes claims he did call back in a few weeks, his own Grievance, and the notes he wrote on there shows he did not, in fact, call the Company, or at least he didn't document calling the Company until October 11, 2005, which was almost two months, or about two months after the Grievance was filed and after the Charging Party was no longer employed there.

Now, based on the Respondent's representations, that the Charging Party had left his job and had never called or come back to work, Mr. Barnes withdrew the Grievance and he admitted that he did not speak to the Charging Party before withdrawing the Grievance.

Of course it's, I'm not sure why there's no charge pending against the Union at this point

over it's representation of the Charging Party, but in any event, those are the facts that Mr. Barnes has admitted.

Now, okay, now, although Barnes did corroborate Mr. Gundogdu, that he had complained to the Union about his hours of work and that Mr., and that the Union in fact prepared a Grievance for him, Mr. Barnes testified that he never told anyone from the Respondent who had filed a Grievance, that he was calling about, or the nature of the Grievance and according to Mr. Barnes he would not have told that to the Respondent until they actually had a face-to-face meeting.

Now, the Charging Party's testimony was also corroborated, to some extent, by the testimony of Recep, I think it's (R-e-c-e-p) Guman. An employee who was called as a witness by the Respondent, and who confirmed that he saw the Charging Party speaking to Mr. Cetinbag's supervisor at the Clark Street garage on the last day that the Charging Party worked. And that he heard Mr. Cetinbag tell the Charging Party just to work four hours because there were too many people working there. And he also heard the Charging Party complaining about his hours being cut.

Guman also corroborated that the Charging Party did appear for work on the following Monday, and at the usual time, and that when he came to work he could not find his timecard and was asking other employees where his timecard was. And although he corroborated that Mr. Gundogdu was there for one to two hours after, after he arrived for work that Monday, he did not see whether Mr. Gundogdu in fact had punched a timecard that morning.

In addition to Mr. Guman, the Respondent called Tom Burrell, the Vice-President and Tom Van Buren, the Vice-President of Operations and Mr. Cetinbag. Now, Burrell testified generally, that the Respondent had good relations with the Union over the years. And he testified that the Respondent terminated, or that the Charging Party was scheduled to work but never showed up or called, and he was terminated for that reason. Now this testimony of Mr. Burrell was not

based on any personal knowledge that he had of the situation, but on information that was reported to him by others.

5 Burrell also testified that Respondent did not hear from the Charging Party again after late September, early October, until February when he came to the office to drop off his uniforms and pick up his final paycheck. Although, certainly by that time the Charge had been filed, so 10 someone at the Respondent certainly had heard through the NLRB, from the Charging Party.

15 Mr. Burrell was also asked about a conversation that occurred when the Charging Party came to the office, a conversation in the presence of Mr. Van Buren, in which he claimed that the Charging Party said he was not happy with his supervisor and complained about his 20 supervisor, Mr. Cetinbag, not liking him and made some reference to the Kurdish-Turkish conflict.

25 Now Mr. Van Buren corroborated Burrell's testimony about the Company's reason for terminating the Charging Party, namely that he did not show up for work or call in, and placed in evidence a disciplinary warning notice which Mr. Van Buren testified had been initiated by Mr. 30 Cetinbag, to document events leading up to the termination.

Again, Mr., as with Mr. Burrell, Mr. Van Buren's testimony was not based on personal 35 knowledge of those events, but on what was reported to him by Mr. Cetinbag. Van Buren's knowledge of these events was limited to what Mr. Cetinbag had reported to him, as I said. And anyway, based on what Mr. Cetinbag had reported in the warning notice that he had initiated, 40 Mr. Van Buren effectuated a termination of the Charging Party on October 7<sup>th</sup>, which he signed on October 6<sup>th</sup>.

45 Now, Mr. Van Buren also testified about the February meeting, when the Charging Party returned with his uniforms, but he acknowledged that that meeting was the result of a conversation with the Board Agent who was investigating the Unfair Labor Practice charge after 50 he told her that the Charging Party could get his final check if he brought back his uniforms.

Now Mr. Van Buren's testimony was inconsistent was that of Mr. Barnes. Mr. Barnes had testified that he spoke to someone from the Company, although he did not identify them. But  
5 Mr. Buren, Van Buren acknowledged that he's the individual who handles Grievances, that he spoke to this individual about the Grievance three weeks after, in October, October 11<sup>th</sup>. But  
10 Mr. Van Buren testified that he did not speak to Mr. Barnes until February when he called Mr. Barnes to inquire whether the Union had any paperwork on the Charging Party.

And it was at that point, which Mr. Van Buren claims that Mr. Barnes faxed the August 12,  
15 2005 Grievance to him and Mr. Van Buren claims this was his first knowledge of the Charging Party's Grievance. And he specifically denied having any conversation with Mr. Barnes on or  
20 around October 11, 2005. Now, both, and both Mr. Burrell and Mr. Van Buren, did acknowledge that it was extremely rare for employees in the Bargaining Unit to file Grievances.

Mr. Van Buren, who as I indicated is the individual who is responsible for handling  
25 Grievances for the Respondent, testified that in his two and a half years, the only Grievance he can recall ever being filed was one that the Charging Party filed in August of 2004 over the  
30 same issue, his hours of work. At that, this Grievance was filed by Mr. Barnes predecessor, Mr. MacArthur, who did not testify in this proceeding.

According to Mr. Van Buren, that Grievance was settled after a meeting in the parking lot  
35 where the Charging Party worked, which the Charging Party, Mr. MacArthur, Mr. Van Buren and Mr. Cetinbag were present and that the settlement was a commitment on Respondent's part to  
40 offer the Charging Party the next full-time position that would open up, provided that doing so would not violate Article 35 of the Contract.

Now Article 35 of the Contract, which is, which Respondent placed in evidence, does  
45 provide that any full-time positions that become open must be offered to part-time employees at that location, by seniority. Now, on cross examination, Mr., during his cross examination, the  
50 Charging Party, Mr. Gundogdu, had denied ever filing a Grievance in 2003 or 2004 and he also

denied that he ever attended any meeting at which the Union and the Company were present to discuss any Grievances that he had filed. He only recalled having one meeting with the Union only, at which his cousin was present. And he also denied knowledge of any settlement agreement. But I, this, his denials of these claims, I think is based more on his limited knowledge and understanding of English and of what exactly a Grievance or a settlement is, rather than a denial that any Grievance had previously been filed for him.

Certainly there's no contention that the documents in evidence showing an August 4<sup>th</sup> Grievance and a Grievance Settlement are not authentic. Now Mr. Cetinbag testified today for the Respondent, that he hired the Charging Party in 2001 as a part-time employee and that the Charging Party left employment once before after he had been disciplined for not insuring that cars had tickets on the dashboards. And Mr. Cetinbag had sent him home for three days and that the Charging Party never came back to work.

Mr. Cetinbag testified that he re-hired the Charging Party despite this prior incident in September of 2003 when he came back seeking employment again, and there was no documentation offered to substantiate the prior leaving or re-hiring. Mr. Cetinbag also explained the transfer of the Charging Party to the Clark Street garage based on Respondent essentially having eliminated his position on South Wabash as a result of a decline in business there.

And he testified that when he transferred the Charging Party to Clark Street, his hours were reduced to four hours a week. Now Mr. Cetinbag also confirms that the Charging Party was upset about this reduction in hours and in fact, according to Mr. Cetinbag, the first two days that he worked at Clark Street, the Charging Party worked beyond the four hours that he was assigned and punched out after six hours. Essentially continuing to work the schedule that he had at his prior position, that prior location.

Now Mr. Cetinbag testified that when he first saw the Charging Party working beyond his scheduled hours on Monday, September 28<sup>th</sup>, he warned him not to go over his hours, but he

did not send him home at that time. The next day, a Thursday, when he again saw the Charging Party working beyond his assigned four hours, he again spoke to the Charging Party and warned him that he was not to work in excess of four hours, but he also did not send him home on the second time. On both occasions, Mr. Cetinbag claims that the Charging Party became angry and talked back to him to the point that he walked away, rather than prolong the situation.

Finally, on Friday, September 30<sup>th</sup>, according to Mr. Cetinbag, when he came to the Clark Street garage at about 9:15, 9:30, he saw the Charging Party was working and reminded him that he was to punch out at 10:00 and that the Charging Party, rather than listening to him, kept insisting that he worked six hours.

Finally, Mr. Cetinbag took the Charging Party's timecard and punched him out at 9:18 a.m. and told him to go home and come back on Tuesday, testifying that he gave him Monday off because the Charging Party already had excess hours for that week. And on cross examination he denied that this was considered a suspension.

Now Mr. Cetinbag denied that he spoke to the Charging Party at any point after Friday, September 30<sup>th</sup>. Now on Tuesday, October 4<sup>th</sup>, according to Mr. Cetinbag, the Charging Party did not appear for work nor did he call in, and that when he did not appear for work or call in on two succeeding days, he informed Mr. Van Buren. But according to Mr. Cetinbag, he did not know that Mr. Van Buren had terminated the Charging Party as a result of this. But he did acknowledge and recognize the warning notice which Mr. Van Buren used to document the termination.

Now Mr. Cetinbag, appeared to be a credible witness, but there were some inconsistencies in his testimony, particularly with respect to the conversations he had with the Union. At first, Mr. Cetinbag testified that he spoke to Mr. Barnes about three weeks after the Charging Party left his employment when Mr. Barnes called Mr. Cetinbag asking for the

Charging Party's phone number.

5 Now when first testifying about this conversation, Mr. Cetinbag said that he did not have  
any further conversation or say anything else to Mr. Barnes at that time. But on cross  
examination, he testified that he told Mr. Barnes that if he did get in touch with the Charging  
10 Party to tell him that Mr. Cetinbag had six hours available and that maybe eight hours because  
of people who had quit.

15 On further cross examination, Mr. Cetinbag recalled an earlier conversation with Mr.  
Barnes, even before the Charging Party left employment, when Mr. Barnes called him about the  
Charging Party's complaint about his hours and at that point, according to Mr. Cetinbag, he told  
20 Mr. Barnes that he only had four hours for the Charging Party.

Mr. Cetinbag also denied the alleged instance of interrogation, testifying that he did not  
25 recall having any conversation where he asked the Charging Party why he called the Union, or  
why he was complaining, but he, you know, but based on his admission that he did speak to the  
Union about a complaint that the Charging Party made while the Charging Party was still  
30 employed there, I find that it is more likely than not, that such a conversation did in fact occur.  
That after speaking to Mr. Barnes about the Charging Party's complaint that in all likely hood he  
35 did approach the Charging Party and ask him why did he complain to the Union about his hours.

I also note that there was a contradiction between the Respondent's witnesses regarding  
what was told to the Unemployment Compensation Board's Referee who held a hearing on the  
40 Charging Party's claim for unemployment benefits on January 3, 2006. The Referee, in the  
Findings of Fact, wrote a statement that ongoing work was available for the Charging Party and  
45 his hours would have been increased back to 30 hours a week the following week.

Now, Mr. Van Buren, when shown the Referee's decision, claimed that Mr. Cetinbag  
made that statement because Mr. Cetinbag is the individual who determines the hours available  
50 and Mr. Van Buren did not know if in fact six hours were available for the Charging Party the

week after he left.

Now Mr. Cetinbag, when he testified, denied that he even participated in the  
5 unemployment hearing and denied that he had six hours available for the Charging Party the  
week after he left, and claimed that those hours did not become available until he spoke to the  
10 Union three weeks later.

Now these contradictions in the record and in the testimony do cast a cloud over the  
credibility of the Respondents, Respondent's witnesses and defense. All right, now that's my  
15 summary of the evidence that I've heard.

Now from, from that evidence, in terms of, basically we have two allegations. There is the  
20 one with respect to interrogation and as both the General Counsel and the Respondent have  
cited Rossmore House, General Counsel cited also Sunnyvale. And those cases stand for the  
general proposition that allegations of interrogation must be based on, there's no 'per se' rule,  
25 it's based on the totality of circumstances. Including the identity of the questioner, the location  
of the questioning, the nature of the questioning, and any background evidence of unfair labor  
practices. Whether there's anything else in the conversation that would tend to make the  
30 questioning coercive.

Now, I've already found, based on my consideration of the other evidence that it's, it's  
35 probable, that the questioning did occur and to that extent. I will credit the Charging Party that  
he was asked why he had complained to the Union. Now, that doesn't end the inquiry. There  
40 isn't much in the way of circumstances, but it appears to me, I do not find that that limited  
questioning was coercive on the facts of this case.

Number one, this, the evidence reveals that this was not the first time the Charging Party  
45 had complained to the Union. In fact, there is documentary evidence of a Grievance a year  
earlier. So the mere fact of the Charging Party being questioned, why he went to the Union,  
50 without anything more, no threatening statements, and a situation where he was already known

to be someone who complained not only to the Union but to the Respondent, I find the circumstances not in, not coercive.

5           So that that questioning, which really was a, to me, nothing more than a casual inquiry as to why the Charging Party had chosen to go the Union, again with this complaint over his hours.  
10       That that did not rise to the level of an Unfair Labor Practice within the meaning Section 8A1 of the Act.

15           Now, with respect to the 8A1 and 3 allegation. The General Counsel and the Respondent both cite Right Line which is the lead case whenever an allegation raises questions of motivation of the employer. And that applies both to protected and concerted activity  
20       discharges as well as Union activity discharges. And essentially places the initial burden on the General Counsel to establish by a preponderance of the evidence that the employee was  
25       engaged in protected activity, that the Respondent was aware of the protected nature of the activity, and that the Respondent had, was motivated by animus toward that activity and taking some adverse action against the employee.

30           If the General Counsel makes such a showing, then the burden shifts to the Respondent to establish, again by a preponderance of the evidence, that whatever action it took against the  
35       individual, it would have taken in any event even if there had been no protected activity. And also, the General Counsel has cited the City Disposal line of cases, also Inter Borough, the Inter Borough is what it's referred to.

40           And those, that doctrine, that policy, the Board has been approved by the, the Supreme Court in City Disposal Systems. And essentially what that says, is that when an employee  
45       makes a reasonable and honest effort to enforce rights he believes he has under his Collective Bargaining Agreement with the Union, and the Employer takes adverse action against someone based on that invocation of a contractual right, that that is an unfair labor practice. Now, and  
50       the Board has also, and the Court and dealing with that Doctrine, I've also indicated that the

Employee doesn't have to be correct in his assertion of a contract right, it just has to be an honest belief that his rights are being violated.

5           Okay, now here, the evidence that I've summarized above, shows that there's no question that the Charging Party had a history of making complaints about his hours of work and that he  
10       also had a history of demanding that he be assigned full-time hours. He complained to the Respondent, he complained to the Union, there's evidence of a prior Grievance that was filed in  
15       August 2004, which was settled with a commitment on the part of the Employer to assign him a full-time position when one became available.

          And based on the evidence submitted by the Respondent, but which was not disputed,  
20       apparently no full-time positions did become available after that August 2004 Settlement Agreement. At least as shown by the remittance report submitted to the Union, there were no  
25       new employees assigned to full-time hours after August of 2004.

          Now with respect to animus, aside from the incidence of interrogation, there is no independent evidence of any animus on the part of the Respondent toward the Charging Party's  
30       pursuit of Grievances or complaints about his hours of work. Although I do note that there was a significant amount of frustration and irritation on the part of Respondent over the Charging  
35       Party's insistence that he should be assigned more hours.

          The next issue to be resolved is, whether in fact he was terminated. The Charging Party and the General Counsel relies on the Charging Party's testimony, that he was terminated on  
40       October 3<sup>rd</sup>, when he reported for work and his timecard was missing. And the, on the other hand, the Respondent claims that he was not terminated, relying upon the testimony of Mr.  
45       Cetinbag, that he sent home on Friday and told the Charging Party to return to work on Tuesday.

          And that when the Charging Party failed to return to work on Tuesday and on two  
50       succeeding days thereafter, that he, he was terminated for failure to show or call for work. And

that, and the date of that would be October 7<sup>th</sup>.

5 Now, while it's not entirely free from doubt, I credit the Charging Party, that on September 30<sup>th</sup>, when he was sent home, that he was not told to return to work on Tuesday. That he was just told to go home.

10 Now, of course I do not find that he was terminated at that point because, as Respondent points out, if in fact he had been told he was terminated, why would he have come back to work the following Monday? Certainly he was sent home. But I think when he left he still believed he 15 was employed by the Respondent, and appeared for work at his usual time on Monday, October 3<sup>rd</sup>, expecting to find his timecard. And that when he returned to work and there was no time for 20 him, for him, at that point he reached the conclusion that Respondent had terminated him. And there was no one there to disavow him of that notion.

25 Now the Board has addressed the issue as to when, what is the test for determining whether, and what constitutes a discharge. Now the Board had, and I'm citing from a case called Lance Investigation Service, Incorporated. It's 338NLRB, actually I have only the number 30 cite, Number 171. It has since been in a bound volume and it should have a page number by now. And that's dated April 30, 2003, where the Board restated that the test, the fact of 35 discharge, does not depend on the use of formal words or firing. It is sufficient if the words or action of the Employer would logically lead a prudent person to believe his or her tenure has been terminated.

40 Now applying this test, I think the actions of the Respondent in removing his timecard, would reasonably led the Charging Party to believe when he appeared for work on October 3<sup>rd</sup>, 45 that he was in fact terminated on that date.

So the question then becomes, was that termination motivated by a protected activity on his part, or Union activity? And has the Respondent met her burden.

50 Now I've already found that the interrogation was not coercive, I think while it is not an

easy issue, I think the evidence in this case does not support a finding of unlawful motivation on the part of the Respondent. There's no dispute that the Charging Party had a history of making  
5 complaints. This was something the Respondent was well aware of and in fact he had continued to work there throughout making these complaints.

10 The only evidence of any type of animus toward those complaints is the one incident of questioning, on the part of his supervisor, Mr. Cetinbag, shortly before he was terminated as to why he had complained to the Union. Without more, I find that questioning is not sufficient to  
15 show any animus or unlawful motivation behind his subsequent termination on October 3<sup>rd</sup>.

In fact, I think what the evidence does demonstrate here, is a, essentially a really serious  
20 misunderstanding on everyone's part about the circumstances.

Clearly I credit Mr. Cetinbag, with respect to the portion of his testimony about the  
25 Charging Party continually showing up for work and working his six hours, even when he had been told that his hours were, had been reduced to four hours.

That conduct borders on insubordination. His supervisor has assigned him four hours of  
30 work, has told him he's only to work four hours. Rather than working his four hours, Mr. Gundogdu engaged in self-help and decided that he was going to work six hours regardless of what anyone told him. And Respondent obviously was frustrated to the point that they sent him  
35 home on Friday, September 30<sup>th</sup>, because he would not work his assigned hours.

Now, at the same time, the Charging Party, not realizing that he was, that he, I guess had  
40 done anything wrong, appeared for work the following Monday and finds his timecard is missing and comes to the conclusion that he has been fired and doesn't go back to work or contact the Employer thereafter. The Respondent meanwhile, when the Charging Party doesn't come back  
45 to work after Monday, concludes that he's abandoned his job and so effectuates a termination.

But in the absence of some strong evidence that the Respondent was acting under some  
50 unlawful motivation, I think there is the misunderstand and the mistake that led to his

termination cannot be attributed to a violation of the Act.

At most, I think the Charging Party, unfortunately, decided to take it upon himself to, to get  
5 the hours that he wanted and rather than dealing with the, the matter through the proper  
channels and the Respondent ultimately terminated him as a result of that conduct, not because  
10 of any protected concerted activity.

Based on those findings and conclusions, I must conclude that the Respondent has not  
violated the Act as alleged in the Complaint. And I will recommend that the Complaint be  
15 dismissed in its entirety.

Now, under the Board's rules and regulations, upon receipt of the transcript, I will certify  
20 the portions of the transcript pages that contain my Bench Decision.

All Parties will be served with a copy of my decision and Recommended Order, certifying  
25 the Bench Decision. And from that point, under the Board's rules and regulations, any Party  
who feels that there are not satisfied with my decision, including any of my findings of fact or  
rulings on evidence, has the right to file exceptions with the NLRB in Washington. And I will  
30 direct you to the Statement of Standard Procedures, as well as the, the Board's Rules and  
Regulations for the proper procedure for filing exceptions. Again, I think this was a very  
difficult case. But I think the evidence does not support a finding of unlawful motivation,  
35 although I think the incident was very unfortunate in terms of the result. But I don't think it had  
anything to do with the filing of Grievances or any protected activity.

40 All right, with that, if there's anything further from the Party's?

MS. TAYLOR: Nothing from the General Counsel.

45 ADMIN. LAW JUDGE MARCIONESE: Okay. All right, and one final question, I guess for  
you, Mr. Meyer, at this point, I had left it open as to whether or not you wanted the Petition to  
Revoke and ruling on the subpoena made a part of the record. Do you wish to have that  
50 included or not?

MR. MEYER: No, no your Honor.

ADMIN. LAW JUDGE MARCIONESE: All right, then if there's nothing further, then the  
5 Hearing is closed. Thank you all.

(Whereupon the hearing was concluded at 1:13 p.m.)

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